IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
October 24, 2007 Session

MARGARET BARGH TAKEDA v. SUMIHIRO TAKEDA

Appeal from the Circuit Court for Hamilton County
No. 03D-1132 Samuel H. Payne, Judge

No. E2006-02499-COA-R3-CV - FILED DECEMBER 17, 2007

In this divorce case, Husband appeals the classification of the marital residence as marital property, the division of the marital property, the restrictions on his parenting time with the parties' two minor children, and the amount of his child support obligation. After careful review, we vacate the trial court's judgment as to the division of the marital estate and remand for further findings of fact in that regard. We affirm the trial court's judgment as to all other matters.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Vacated in Part and Affirmed in Part; Cause Remanded

SHARON G. LEE, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

John R. Morgan, Chattanooga, Tennessee, for the appellant, Sumihiro Takeda.

Marvin Berke and Megan England Demastus, Chattanooga, Tennessee, for the appellee, Margaret Bargh Takeda.

OPINION

I. Background

The parties in this divorce case, Sumihiro Takeda ("Husband"), a Japanese citizen, and Margaret Bargh Takeda ("Wife"), an American citizen, met while employed as associate professors at a university in Tokyo, Japan, and were later married in Illinois on April 1, 1998. After their marriage, the parties returned to Japan where they continued to reside and teach for the next four years, during which time they had two children - Kevin Ichiro Takeda (DOB June 12, 1998) and Margot Izmi Takeda (DOB February 9, 2001). In July of 2002, Wife returned to the United States with the children and assumed employment as an assistant professor at the University of Tennessee in Chattanooga. Around this same time period, Husband transferred approximately $319,000 from a separate bank account he maintained in Japan to a joint account Wife had opened for the parties in Chattanooga. Of this $319,000, $290,000 was used to purchase a house in Hixson near Chattanooga, and the balance of $29,000 was used to purchase a Honda Odyssey automobile. A few weeks after the arrival of Wife and the children, Husband also moved to the United States; however, he resided in California after accepting a one year sabbatical at the University of California at Los Angeles. Following his move to California, Husband maintained regular contact with Wife and the children and made periodic commutes from Los Angeles to Chattanooga.

In June of 2003, Wife filed a complaint for divorce upon the ground of irreconcilable differences and, inter alia, requested that she be awarded custody of the parties' children and that she be granted child support, rehabilitative alimony, and an equitable share of the marital estate. Thereafter, Husband filed his answer and counter-complaint for divorce upon the ground of inappropriate marital conduct and requested, inter alia, that he be awarded primary custody of the parties' children. It appears that at some time thereafter, upon completion of his sabbatical in Los Angeles in 2003, Husband returned to Japan, and he has resided there since that time.

The case was tried in part on March 21, 2005, and May 2, 2005, after which, on June 10, 2005, the trial court entered its order granting both parties a divorce upon stipulated grounds**.** The trial court awarded Wife the residence, stipulated to have a value of $320,000; awarded Husband an interest in the residence in the amount of $150,000, to be secured by a deed of trust; and awarded Wife all of the contents of the residence and the parties' 2002 Honda Odyssey automobile. The order also provided that each party retain his or her separate checking, savings, and investment accounts; that Husband be awarded all personal property in his possession; and that Wife be responsible for payment of all marital debts. Remaining matters of child support and parenting time, including the issue of whether Husband would be allowed to take the children to Japan for visitation, were reserved for later hearing.

Following the subsequent hearing as to child support and parenting time, on September 6, 2006, the trial court entered its final order designating Wife the primary residential parent of the parties' two minor children. The order further denied Husband's request that he be allowed parenting time with the children in Japan, noting that Japan is not a signatory to the Hague

Convention. Finally, the order adopted and incorporated a permanent parenting plan signed by counsel for each party. Among other things, the parenting plan set forth a child visitation schedule and designated the responsibilities of each parent with respect to their children, including the requirement that Husband pay monthly child support in the amount of $1,200. Thereafter, Husband filed a motion to alter or amend the plan and final order upon the ground that "[a]s the result of a clerical error, certain portions of the Permanent Parenting Plan were not agreed to by the parties." After this motion was denied, Husband filed the present appeal.

II. Issues Presented

The following issues are presented for our review:

1) Whether the trial court erred in classifying the Hixson residence as marital property.

2) If the Hixson residence was properly classified as marital property, whether the trial court erred in its apportionment of the value of such property between the parties.

3) Whether the trial court erred in its ruling as to Husband's rights of child visitation.

4) Whether the trial court erred in its award of child support.

III. Analysis

A. Standard of Review

In a non-jury case such as this one, we review the record *de novo* with a presumption of correctness as to the trial court's determination of facts, and we must honor those findings unless the evidence preponderates to the contrary. Tenn. R. App. P. 13(d); ***Union Carbide v. Huddleston****,* 854 S.W.2d 87, 91 (Tenn. 1993). When a trial court has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, considerable deference must be accorded to either as to the trial court's factual findings. ***Seals v. England/Corsair Upholstery Mfg. Co.,*** 984 S.W.2d 912, 915 (Tenn. 1999). The trial court's conclusions of law are reviewed *de novo* and are accorded no presumption of correctness. ***Campbell v. Florida Steel Corp.****,* 919 S.W.2d 26, 35 (Tenn. 1996); ***Presley v. Bennett****,* 860 S.W.2d 857, 859 (Tenn. 1993).

B. Classification of the Residence

Husband argues that the trial court erred in its classification of the residence in Tennessee as marital property, contending that the residence should have been classified as his separate property because the sole source of the $290,000 used to purchase the residence came from the $350,000 that he inherited from his father's estate in March of 2001. We do not agree with Husband's argument.

The division of the marital estate begins with the classification of the parties' property as either "marital" or "separate." ***McClellan v. McClellan***, 873 S.W.2d 350, 351 (Tenn. Ct. App.

1993). Tenn. Code Ann. § 36-4-121 sets forth the definition of marital property. "Generally speaking property that is acquired during a marriage by either or both spouses and still owned by either or both spouses when the divorce is granted is classified as marital property and is thus subject to equitable division." ***Humphries v. Humphries***, No. E2000-02912-COA-R3-CV, 2001 WL 825986 at *3 (Tenn. Ct. App. E.S., filed July 23, 2001). "Separate property" is statutorily defined as "[a]ll real and personal property owned by a spouse before marriage" and includes "[p]roperty acquired by a spouse at any time by gift, bequest, devise or descent." Tenn. Code Ann. § 36-4-121(b)(2). As recognized by the Tennessee Supreme Court, a spouse's separate property may become marital property by "commingling" and "transmutation":

> [S]eparate property becomes marital property [by commingling] if inextricably mingled with the marital property or with the separate property of the other spouse. If the separate property continues to be segregated or can be traced into its product, commingling does not occur . . . . [Transmutation] occurs when separate property is treated in such a way as to give evidence of an intention that it become marital property . . . . The rationale underlying these doctrines is that dealing with property in these ways creates a rebuttable presumption of a gift to the marital estate. This presumption is based upon the provision in many marital property statutes that property acquired during the marriage is presumed to be marital. The presumption can be rebutted by evidence of circumstances or communications clearly indicating an intent that the property remain separate.

Langschmidt v. Langschmidt, 81 S.W.3d 741, 747 (Tenn. 2002) (alterations in original) (citations omitted).

Further, with specific regard to a marital residence, we have heretofore noted as follows:

> A residence should not be classified as marital property simply because the parties have lived in it. However, as a general matter, a marital residence acquired by the parties during the marriage and owned by the parties jointly should be classified as marital property. Even a marital residence that was . . . purchased using separate property should be classified as marital property if the parties owned it jointly because joint ownership gives rise to a rebuttable presumption that the property is marital, rather than separate property.
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> However, as relevant as record ownership may be to the classification of an asset, it is not always controlling. In the final analysis, whether a particular asset is marital or separate depends on the conduct of the parties not the record title of the asset . . . .

> Four of the most common factors courts use to determine whether real property has been transmuted from separate property to marital property are: (1) the use of the property as a marital residence; (2) the ongoing maintenance and management of the property by both parties; (3) placing the title to the property in joint ownership; and (4) using the credit of the non-owner spouse to improve the property.

Fox v. Fox, No. M2004-02616-COA-R3-CV, 2006 WL 2535407 at *5 (Tenn. Ct. App. M.S., filed Sept. 1, 2006) (citations omitted).

There is no question that the monies Husband inherited from his father's estate during the marriage were his separate property when he received them and remained his separate property as long as they were segregated in his separate bank account. However, contrary to his assertion that the funds in this separate account consisted solely of his separate property, Husband testified that he had also deposited some funds in this separate account that represented earnings from his employment during the marriage and thus, it cannot be maintained that the $319,000 transferred from that account consisted solely of Husband's separate property. Furthermore, there is no evidence that Husband intended that the funds from this separate account remain his separate property after he transferred them to the parties' joint account in Chattanooga. By transferring these funds to the joint account so that they would be available for the purchase of the residence in Hixson, Husband treated the funds in such a way as to give proof of an intention that they become marital property. The mere assertion of the origin of the funds is insufficient to overcome the presumption that the funds became marital property once deposited in the parties' joint account, and it necessarily follows that the residence purchased with funds from such account is likewise marital property.

Moreover, even if it were agreed that the funds attributable to Husband's inheritance retained the status of separate property after their transfer to the parties' joint account, it is clear that the residence purchased with such funds was marital property and not the separate property of Husband for several reasons. The residence is presumed to be marital property given that it was purchased during the marriage and titled in the names of both Husband and Wife. The residence was occupied by Wife and the children, and Husband never occupied the residence alone as his separate property. In addition, Wife testified without dispute that on one occasion, she contacted Husband about a termite problem at the house and that "he said go ahead and hire the termite man. I will pay half. I hired the termite man, and I paid, and then he didn't." Wife testified that this particular maintenance cost totaled $2,000. In short, Husband presented no proof showing an intent to keep and maintain the residence as his separate property, *see* ***id.*** at *5, and we do not find that the evidence preponderates against the trial court's determination that the residence was marital property.

C. Distribution of Marital Estate

Next, Husband contends that even if the trial court properly classified the residence as marital property, the court's division of the residence was inequitable and that Wife received an excessive

share of such property's value.

With respect to the division of marital property in the event of divorce, Tenn. Code Ann. § 36-4-121(a)(1) provides as follows:

> (a)(1) In all actions for divorce or legal separation, the court having jurisdiction thereof may, upon request of either party, and prior to any determination as to whether it is appropriate to order the support and maintenance of one (1) party by the other, equitably divide, distribute or assign the marital property between the parties without regard to marital fault in proportions as the court deems just.

While Husband argues that he should have been awarded a larger portion of the value of the marital residence, the real question we must address is whether the trial court's distribution of the marital estate as a whole was equitable, and we cannot properly address that question absent a determination as to the value of the marital estate. As previously noted, the trial court's order of June 10, 2005, acknowledged that the marital residence was stipulated to have a value of $320,000, and awarded Husband a $150,000 lien against that value. With respect to other property, the order provided as follows:

> Tangible Personal Property. [Wife] is awarded all right, title and interest in and to the appliances and furnishings and other contents of the home, as well as the 2002 Honda Odyssey automobile. [Husband] is awarded his clothing, jewelry, computer, and other personal effects, and all personal property in his possession.
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> Accounts; Financial Assets. [Wife] is awarded her Vanguard IRA, her TIAA Cref Bond Market Account, and her First Tennessee checking and savings accounts.
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> [Husband] is awarded his Bank of America checking and savings accounts, his Sumitomo Mitsui Bank savings account, his Shinsei Bank savings account, his Citibank savings account number 5926181, and his Citibank savings account number 99960427. [Husband] shall continue to have the use of the Bank of Tokyo-Mitsubishi savings account number 075-004-73894, wherein are deposited funds of his employer, designated for business and research use, for purposes of his employment only.
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> Marital Debt. [Wife] shall be responsible for timely payment and satisfaction of the 2004 property tax owed on the above described dwelling, the MBNA account in the amount of $24,953.01, the Discover account in the amount of $6,197.59, and the loan by

> Margaret Bargh to [Wife] in the amount of $5,000.00. [Wife] also shall pay and timely satisfy any debt owed upon a Sears charge account, the VISA credit card account, the Mastercard account, and the Best Buy account. Each party shall be responsible for the fees and expenses of his or her own attorney of record.

After reviewing the trial court's order dividing the marital estate and the trial transcript, we are precluded from determining whether the trial court's division of the marital estate was equitable because the trial court failed to make any findings of fact as to the value of much of the marital property. The trial court made no finding as to the value of the Honda Odyssey automobile, which Wife valued at $11,105 and Husband valued at $20,000, nor did the trial court make a finding as to the value of the household furnishings, which was also disputed by the parties with Wife valuing those assets at $11,350 and Husband valuing them at $30,000. In addition, there is no indication of the trial court's findings as to the amounts outstanding on the various debts for which Wife was made responsible, other than the MBNA account, the Discover account, and the loan from Margaret Bargh. The trial court also refers to various financial accounts, but their value and whether they are separate assets or part of the marital estate is not indicated. As we have stated on prior occasion, "as part of its responsibility to divide the marital estate equitably, the trial court must determine the value of the property included." ***Houston v. Houston***, No. W2002-02022-COA-R3-CV, 2003 WL 22326970, at *6 (Tenn. Ct. App. W.S., filed May 29, 2003) (citing ***Thomas v. Thomas***, No. M2001-01226-COA-R3-CV, 2002 WL 1787950, at *6 (Tenn. Ct. App. M.S., filed Aug. 2, 2002).

Furthermore, in determining what constitutes an equitable division of marital property, Tenn. Code Ann. § 36-4-121(c) provides that the court is required to consider "all relevant factors," including the following:

> (1) The duration of the marriage.
> (2) The age, physical and mental health, vocational skills, employability, earning capacity, estate, financial liabilities and financial needs of each of the parties;
> (3) The tangible or intangible contribution by one (1) party to the education, training or increased earning power of the other party;
> (4) The relative ability of each party for future acquisitions of capital assets and income;
> (5) The contribution of each party to the acquisition, preservation, appreciation, depreciation or dissipation of the marital or separate property, including the contribution of a party to the marriage as homemaker, wage earner or parent, with the contribution of a party as homemaker or wage earner to be given the same weight if each party has fulfilled its role;
> (6) The value of the separate property of each party;
> (7) The estate of each party at the time of the marriage;
> (8) The economic circumstances of each party at the time the division

> of property is to become effective;
> (9) The tax consequences to each party, costs associated with the reasonably foreseeable sale of the asset, and other reasonably foreseeable expenses associated with the asset;
> (10) The amount of social security available to each spouse; and
> (11) Such other factors as are necessary to consider the equities between the parties.

At the close of proof at the March 25, 2007, hearing, the trial court made the following comments that indicate the rationale for its decision with respect to the division of marital property:

> [Husband] put up $290,000 plus he put up $29,000 . . . . So his interest in the house if and when it's sold is $150,000. The $150,000 extra he put up covers everything he owed [Wife], [her] debts, [her] retirement. [Wife] keep[s] everything else. . . . [Husband] doesn't pay any of [Wife's] debts. [Wife's] debts, she'll have to pay them all.
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> . . .
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> [Husband] is extremely wealthy . . . and [Wife] is not.

As best we can discern from this language, the trial court's decision as to the division of the marital residence appears to have been based upon the financial liabilities of Wife as the result of her having been assigned responsibility for all of the marital debt, the general economic circumstances of each party at the time of the property division, and the value of Husband's separate property. The trial court's consideration of each of these factors was proper and consistent with the requirements of Tenn. Code Ann. § 36-4-121(c). However, the trial court made no finding of fact as to either party's financial liabilities and financial needs, including costs that Husband will incur in traveling to the United States for parenting time with his children. Nor is there any indication that the trial court considered other statutory factors we deem to be relevant in this matter such as the duration of the parties marriage, the contribution of each party to the acquisition of marital property, the estate of each party at the time of marriage, and the value of the parties' separate property.

In light of the absence of findings of fact as to the value of the marital estate and consideration of all relevant statutory factors set forth at Tenn. Code Ann. § 36-4-121(c), we vacate the order of the trial court as to the division of the marital estate and remand for further proceedings consistent with this opinion.

D. Parenting Time

The next issue we address is whether the trial court erred in denying Husband's request that he be allowed visitation with his children in Japan. The trial court's order of September 6, 2006, indicates that the trial court ruled that Husband would not be allowed parenting time with his

children in Japan because Japan is not a signatory to the Hague Convention. As set forth in the Convention's preamble, the Hague Convention was adopted by signatory nations "to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access." *See* ***March v. Levine***, 249 F.3d 462, 465 (6th Cir. 2006). Husband asserts that the trial court reasoned "that Japan not being a party to the Hague Convention, [Husband] could keep the children in Japan and would be immune from prosecution." Husband argues that there was no evidence supporting the trial court's rationale and states "there was never any proof or showing by [Wife] that such was a threat, had been threatened or a realistic probability."

Although Husband provided this Court with a copy of the transcript of the March 21, 2005, hearing as to matters of property division, Husband failed to provide a transcript of the subsequent hearing wherein the trial court determined that Husband would not be allowed parenting time in Japan. In ***Coakley v. Daniels***, 840 S.W.2d 367 (Tenn. Ct. App. 1992), we noted that "where the issues raised go to the evidence, there must be a transcript. In the absence of a transcript of the evidence, there is a conclusive presumption that there was sufficient evidence before the trial court to support its judgment, and this Court must therefore affirm the judgment." ***Id.*** at 370. In the absence of a transcript, we must presume that the evidence presented at the hearing on child visitation supported the trial court's ruling in that regard, and Husband's argument that the evidence preponderated otherwise is without merit.

E. Child Support

Finally, Husband contends that the trial court erred in determining the amount of child support he would be required to pay. It is our determination that Husband waived this issue.

The trial court's order of September 6, 2006, states that "*the parties announced an agreement with respect to* parenting time under the Court's limitations and *future child support to be paid by [Husband]*." (Emphasis added). The order further states that "[Wife] is designated as the primary residential parent, and *the parties['] respective* parenting time, rights, *obligations, including child support to be paid by [Husband] are set forth more fully in the attached Permanent Parenting Plan, adopted and incorporated by reference in its entirety."* (Emphasis added). The referenced parenting plan, which is signed by counsel for both parties, states that "Father will pay child support in the amount of $1,200.00 per month." Subsequently, Husband filed a motion to alter or amend the plan upon allegation that "as the result of a clerical error, certain portions of the Permanent Parenting Plan were not agreed to by the parties." Thereafter, by order entered on November 27, 2006, the trial court decreed the deletion of a paragraph of the parenting plan pertaining to private school and college education upon announcement that such paragraph had been agreed to in error of the parties. However, the record contains no assertion of error as to that portion of the parenting plan setting forth Husband's child support obligation. It appearing that Husband agreed that he would pay $1,200 per month in child support, his argument that the amount of such obligation be reduced is deemed waived.

IV. Conclusion

For the reasons stated in this opinion, we vacate the judgment of the trial court as to division of the marital estate, and remand for further proceedings in that regard. The judgment of the trial court is affirmed as to all other matters. Costs of appeal are assessed equally between the parties.

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SHARON G. LEE, JUDGE